14-1507

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize *any* refusal by a motorist to submit to such a test, even if a warrant has not been obtained. Here, petitioner submitted to a test after being informed that refusal is a criminal offense; North Dakota subsequently suspended his drivers' license when the test returned positive. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

TABLE OF CONTENTS

Page

Question Presented i
Opinions Below 1
Jurisdiction 1
Constitutional and Statutory Provisions Involved 1
Statement 3
Reasons for Holding the Petition 5
Conclusion 5
Appendix A – North Dakota Supreme Court opinion (February 12, 2015) 1a
Appendix B – North Dakota district court opinion (February 3, 2014) 23a
Appendix C – North Dakota district court order (February 10, 2014) 38a
Appendix D – North Dakota Department of Transportation hearing officer decision (September 18, 2013) 40a
Appendix E – Denial of rehearing (March 24, 2015) 44a

PETITION FOR A WRIT OF CERTIORARI

Petitioner Steve Michael Beylund respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Dakota in this case.

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota (App., *infra*, 1a-22a) is reported at 859 N.W.2d 403. The decision of the North Dakota district court (*id.* at 23a-37a) is unreported.

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered on February 12, 2015. App., *infra*, 22a. That court denied petitioner's motion for rehearing on March 24, 2015. *Id.* at 44a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

North Dakota law, N.D. Code § 39-08-01(1), provides in relevant part:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>
> * * *
>
> e. That individual refuses to submit to any of the following:
>
> (1) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or
>
> (2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01; or
>
> (3) An onsite screening test, or tests, of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer under section 39-20-14.

> 2. a. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section 39-06.2-10.2, 39-20-01, or 39-20-14, is guilty of an offense under this section.

STATEMENT

This case is one of several presenting a question of exceptional importance: whether a State may criminalize a motorist's refusal to consent to chemical tests of his or her blood, breath, or urine. While this case involves the suspension of a driver's license—rather than the imposition of a criminal sanction—the reasoning of the court below turned substantially on its holding in a companion criminal case, which is currently before the Court in *Birchfield* v. *North Dakota*, No. 14-1468. For the reasons explained in *Birchfield*, as well as in *Bernard* v. *Minnesota*, No. 14-1470, the Court should grant the petitions in those cases; it should hold this petition pending disposition of those matters.

1. North Dakota, like twelve other States, has criminalized the refusal of a motorist who has been arrested for driving under the influence to submit to a warrantless chemical test designed to detect the presence of alcohol in the driver's blood. See N.D. Code § 39-08-01(1). A first refusal to consent to a chemical test qualifies as a misdemeanor, while subsequent offenses may qualify as a felony. *Ibid.*

2. Here, an officer stopped petitioner on suspicion of driving while intoxicated. App., *infra*, 2a-3a. Petitioner contends that the chemical test, adminis-

tered pursuant to North Dakota's test-refusal statute, was compelled in violation of his constitutional rights. *Id.* at 7a. As a result of a chemical test indicating that he was intoxicated, the North Dakota Department of Transportation suspended petitioner's automobile license for a period of two years. *Id.* at 40a-42a.

3. Petitioner appealed his license suspension to a North Dakota district court, which affirmed the suspension. App., *infra*, 23a-39a. Notwithstanding the "reading of the Implied Consent/Refusal law itself," the court concluded that "[a]ssessing the totality of the circumstances," it was "not persuaded that [petitioner] was coerced into consenting to the chemical test of his breath and blood." *Id.* at 36a.

4. The North Dakota Supreme Court affirmed. App., *infra*, 1a-22a. Resting substantially on its recent decision in *Birchfield*, the court reasoned that petitioner "voluntarily consented to the blood test." App., *infra*, 8a. The court noted that, under the "doctrine of unconstitutional conditions," "the government may lawfully impose conditions, including the surrender of a constitutional right, provided the conditions are reasonable." *Id.* at 12a. Having held in *Birchfield* that searches conducted pursuant to the implied consent law are not in fact unreasonable—and thus not in violation of the Fourth Amendment—the court concluded that petitioner "has not pointed out any statute under North Dakota's implied consent laws that requires him to submit to a blood test contrary to the Fourth Amendment." *Id.* at 16a. Because there was no "unreasonable search without a warrant or an exception to the warrant requirement," petitioner's unconstitutional conditions argument failed. *Ibid.*

The state court subsequently denied petitioner's request for rehearing. App., *infra*, 44a.

REASONS FOR HOLDING THE PETITION

The lower court's analysis turned, expressly, on its earlier decision in *State* v. *Birchfield*, 858 N.W.2d 302 (N.D. 2015), cert. pending *Birchfield* v. *North Dakota*, No. 14-1468. Although the penalty imposed below was civil in nature, the court's conclusion rested on its holding in *Birchfield* that compelling submission to a test by threatening criminal penalties for refusal is constitutional. The Court, accordingly, should hold this petition pending its resolution of *Birchfield*, and then it should dispose of it in accord with the result of that proceeding.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Birchfield* v. *North Dakota*, No. 14-1468.

Respectfully submitted.

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JUNE 2015

[1] The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

APPENDICES

APPENDIX A

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2015 ND 18

Steve Michael Beylund, Petitioner and Appellant

v.

Grant Levi, Director of the Department of Transportation Respondent and Appellee

No. 20140133

Appeal from the District Court of Bowman County, Southwest Judicial District, the Honorable William A. Herauf, Judge.

AFFIRMED.

Opinion of the Court by McEvers, Justice.

Thomas F. Murtha IV, P.O. Box 1111, Dickinson, ND 58602-1111, for petitioner and appellant.

Douglas B. Anderson, Office of Attorney General, 500 N. 9th St., Bismarck, ND 58501-4509, for respondent and appellee.

Beylund v. Levi
No. 20140133

McEvers, Justice.

[¶1] Steve Michael Beylund appeals from a district court judgment affirming a Department of Transportation decision suspending his driving privileges for two years. We affirm concluding Beylund voluntarily consented to the chemical blood test administered by the police officer, and the criminal refusal statute does not violate Beylund's right under the Fourth Amendment or N.D. Const. art. I, § 8, nor does it violate the Fourth Amendment under the doctrine of unconstitutional conditions. We decline to address Beylund's argument regarding the legality of the stop because the issue was not sufficiently articulated in Beylund's specifications of error.

I

[¶2] On August 10, 2013, a Bowman police officer was dispatched to a call of an unwanted person. The police officer observed a vehicle that matched the given description of the unwanted person's vehicle, although the police officer testified that he "didn't think anything of that at the time." The police officer observed the vehicle nearly hit a stop sign while making a right hand turn into a driveway. The vehicle then stopped, partially in the roadway. The police officer testified he pulled up and stopped behind the vehicle, without activating his patrol car's emergency lights, and approached the vehicle "to make sure everything was fine with the individual or what was going on."

[¶3] According to the police officer's testimony, when he approached the vehicle, he noticed an empty wine

glass in the center console and an odor of alcohol emanating from the vehicle. The police officer returned to his patrol car to activate its amber warning lights. The police officer requested Beylund exit the vehicle, but he refused, until the police officer opened the door and commanded him to exit. Beylund struggled with his balance and was generally uncooperative. Beylund refused all field sobriety tests, claiming he had a "bad leg." Beylund agreed to take an onsite screening test, but failed to provide an adequate breath sample. The police officer then arrested Beylund and transported him to the hospital. At the hospital, the police officer read the implied consent advisory to Beylund, and Beylund agreed to take a chemical blood test. A blood sample was collected and submitted to the state laboratory. The test results showed an alcohol concentration of 0.250 g/100ml.

[¶4] In September 2013, a hearing was held before a Department of Transportation hearing officer. At the conclusion of the hearing, the hearing officer found the police officer had reasonable grounds to believe Beylund had been driving a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. § 39-08-01. Accordingly, the hearing officer suspended Beylund's driving privileges for two years.

[¶5] Beylund petitioned for reconsideration of the hearing officer's decision. Beylund argued the blood test was an unconstitutional warrantless search, without a valid exception to the warrant requirement, and North Dakota's implied consent law violates the unconstitutional conditions doctrine. The hearing officer granted Beylund's petition for reconsideration, but denied relief.

[¶6] Beylund filed a notice of appeal and specifications of error with the clerk of district court, appealing the hearing officer's suspension of his driving privileges. Beylund's specifications of error raised the same issues as his petition for reconsideration. However, in Beylund's appellant's brief to the district court, he also asserted the stop of his vehicle was illegal. The district court affirmed the hearing officer's decision. Beylund now appeals to this Court.

II

[¶7] "This Court reviews the Department's decision to suspend a person's driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32." *McCoy v. N.D. Dep't of Transp.*, 2014 ND 119, ¶ 6, 848 N.W.2d 659 (citing *Painte v. Dir., Dep't of Transp.*, 2013 ND 95, ¶ 6, 832 N.W.2d 319). "We review the agency's decision on appeal from the district court. However, the district court's analysis is entitled to respect if it is sound." *Herrman v. N.D. Dep't of Transp.*, 2014 ND 129, ¶ 6, 847 N.W.2d 768 (citation omitted) (quotation marks omitted). An agency's decision is accorded great deference, when reviewed on appeal. *McCoy*, at ¶ 6. Under N.D.C.C. § 28-32-46, we must affirm an administrative agency's decision unless one of the following conditions applies:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

[¶8] "We do not make independent findings of fact or substitute our judgment for that of the agency." *Fossum v. N.D. Dep't of Transp.*, 2014 ND 47, ¶ 9, 843 N.W.2d 282. Rather, we solely determine "whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." *Yellowbird v. N.D. Dep't of Transp.*, 2013 ND 131, ¶ 8, 833 N.W.2d 536. Once the facts are established, their significance presents a question of law, which we review de novo, *Bell v. N.D. Dep't of Transp.*, 2012 ND 102, ¶ 20, 816 N.W.2d 786. The "standard of review for a claimed violation of a constitutional right is de novo." *Martin v. N.D. Dep't of Transp.*, 2009 ND 181, ¶ 5, 773 N.W.2d 190.

III

[¶9] Beylund argues his stop was illegal because law enforcement did not have a reasonable articulable suspicion and the community caretaker function does not apply. The Department argues Beylund waived

his argument regarding the legality of the stop, by not including it in his specifications of error to the district court and, therefore, this Court should decline to consider this argument on appeal.

[¶10] Under N.D.C.C. § 28-32-42(4), a party appealing from the Department's decision to suspend driving privileges must file a notice of appeal and specifications of error. *Midthun v. N.D. Workforce Safety Ins.*, 2009 ND 22, ¶ 7, 761 N.W.2d 572; *Daniels v. Ziegler*, 2013 ND 157, ¶ 7, 835 N.W.2d 852. The specifications of error must be reasonably specific, "detailing which matters are at issue, so as to alert the agency, other parties, and the court of the particular errors claimed." *Midthun*, 2009 ND 22, ¶ 7, 761 N.W.2d 572 (citing *Vetter v. N.D. Workers Comp. Bureau*, 554 N.W.2d 451, 454 (N.D. 1996)). "Boilerplate specifications of error which are general enough to apply to any administrative agency appeal are not tolerated by this Court, and are ripe for dismissal." *Midthun*, at ¶ 7 (citing *Dettler v. Sprynczynatyk*, 2004 ND 54, ¶ 15, 676 N.W.2d 799). This Court will not consider issues that are not enumerated in the specifications of error. *Id.*

[¶11] Here, Beylund did not include the legality of his stop argument in the specifications of error to the district court. Rather, he merely asserted he "reserves the right to make additional specifications of error pending receipt of the transcript of the administrative hearing." Beylund's broad attempt to reserve the right to make additional specifications of error was not reasonably specific enough to effectively preserve the legality of the stop argument. In *Isaak v. Sprynczynatyk*, we concluded the phrase: "[a]ny other issues to be determined following a review of the hearing transcript" in a specifications of

error was boilerplate because it was "so general it could apply to any administrative agency appeal." 2002 ND 64, ¶¶ 4, 7, 642 N.W.2d 860. We similarly conclude Beylund's specifications of error attempting to reserve the right to make additional arguments after he received the administrative hearing transcript is "so general it could apply to any administrative agency appeal." *Id.* at ¶ 7. Accordingly, Beylund waived his argument regarding the legality of his stop; therefore, we decline to address it.

IV

[¶12] Beylund argues his right to be free of unreasonable searches and seizures, under the Fourth Amendment and N.D. Const, art. I, § 8, was violated by the chemical test of his blood, under the State's implied consent law. Without specifically referencing any statute, he claims his consent to take the test was involuntary because he was coerced by the statute's penalties, which criminalize refusal. Beylund does not allege any coercive circumstances, other than the penalties under N.D.C.C. ch. 39-20.

[¶13] Beylund relies in part on *Camara v. Mun. Court of the City & Cnty. of San Francisco*, 387 U.S. 523 (1967), to support his premise that the criminal refusal law violates the Fourth Amendment. In *Camara*, a city ordinance authorized city employees to enter any building in the city after presenting proper credentials, and provided for a criminal penalty if the owner refused. *Id.* at 526-27. The Supreme Court ruled the owner "had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.

[¶14] As we recently discussed in *State v. Birchfield*, in the context of North Dakota's implied consent law challenges, this Court is not persuaded by *Camara*, and cases like it:

> Unlike the regulation in *Camara* which allowed for suspicionless searches of private property, implied consent laws, like North Dakota law, do not authorize chemical testing unless an officer has probable cause to believe the defendant is under the influence, and the defendant will already have been arrested on the charge.

2015 ND 6, ¶ 15.

[¶15] Prior to *Birchfield*, this Court recently considered state and federal constitutional challenges of the State's implied consent law based on arguments that a driver is coerced by the penalty for refusal. In *McCoy*, this Court concluded "a driver's decision to agree to take a test is not coerced simply because an administrative penalty has been attached to refusing the test." 2014 ND 119, ¶ 21, 848 N.W.2d 659. In *State v. Smith*, we concluded the increased penalties under the State's implied consent law that went into effect in 2013, making refusal to take a test a crime, did not change our coercion analysis from *McCoy*. 2014 ND 152, ¶¶ 9, 16, 849 N.W.2d 599. Our analysis in *Smith* and *Birchfield* considers the same challenges Beylund brings under both the state and federal constitutions. Because Beylund alleges no other coercive circumstances, other than the penalties under N.D.C.C. ch. 39-20, we conclude he voluntarily consented to the blood test.

V

[¶16] Beylund also argues North Dakota's implied consent law violates the unconstitutional conditions doctrine because it conditions the privilege of driving on the relinquishment of the constitutional right to be free of unreasonable searches and seizures. This Court has not previously addressed Beylund's argument on the "unconstitutional conditions doctrine." *See Herrman*, 2014 ND 129, ¶ 12, 847 N.W.2d 768 (declining to address unconstitutional conditions argument); *McCoy*, 2014 ND 119, ¶ 28, 848 N.W.2d 659 (declining to address unconstitutional conditions argument).

[¶17] In *Birchfield*, we explained our standard of review in the context of a constitutional challenge to the State's implied consent law:

> Our standard for reviewing constitutional challenges to legislative enactments is well-established:
>
> The determination whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal. All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution. Any doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity. The power to declare a legislative act unconstitutional is one of the highest functions of the courts, and that power must be exercised with great restraint. The presumption of constitutionality is so strong that a statute will not be de-

> cleared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt. The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity.

Simons v. State, 2011 ND 190, ¶ 23, 803 N.W.2d 587 (internal citations omitted).

Driving is a privilege, not a constitutional right and is subject to reasonable control by the State under its police power. *See, e.g., State v. Smith*, 2014 ND 152, ¶8, 849 N.W.2d 599; *McCoy v. North Dakota Dep't of Transp.*, 2014 ND 119, ¶ 26, 848 N.W.2d 659. Under N.D.C.C. § 39-20-01(1), an individual who drives "is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test . . . ." A chemical test may be administered "only after placing the individual . . . under arrest." N.D.C.C. § 39-20-01(2). However, a driver has a right to refuse a chemical test under N.D.C.C. § 39-20-04(1), which provides, "If a person refuses to submit to testing under section 39-20-01 ... , none may be given." *See State v. Fetch*, 2014 ND 195, ¶ 8, 855 N.W.2d 389.

The criminal refusal provision is contained in N.D.C.C. § 39-08-01, which provides in relevant part:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:

. . . .

e. That individual refuses to submit to any of the following:

. . . .

(2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01; . . .

2. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section . . . 39-20-01 . . . is guilty of an offense under this section.

Section 39-20-01, N.D.C.C., sets forth the implied consent requirements for motor vehicle drivers in general and in subsection 3 states that the "law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs" and "that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence."

> The Fourth Amendment and N.D. Const. art. I, § 8, prohibit unreasonable searches and seizures, and the administration of chemical tests to determine alcohol concentration is a search for purposes of these constitutional provisions. *See Smith*, 2014 ND 152, ¶ 7, 849 N.W.2d 599; *McCoy*, 2014 ND 119, ¶ 10, 848 N.W.2d 659.

Birchfield, 2015 ND 6, ¶¶ 5-8. The United States Supreme Court has not decided, and it is a question of first impression, whether North Dakota's implied consent law represents an unconstitutional condition.

[¶18] Because we have not previously addressed the "doctrine of unconstitutional conditions," some background is helpful. Generally speaking, the doctrine provides the government ordinarily may not grant a benefit conditioned on the surrender of a constitutional right, even if the government may withhold the benefit altogether. 16A Am. Jur. 2d *Const. Law* § 411 (2009 & Supp. 2014). However, under the doctrine, the government may lawfully impose conditions, including the surrender of a constitutional right, provided the conditions are reasonable. *Id.* Therefore, even if the unconstitutional conditions doctrine applies to the Fourth Amendment, it does not necessarily mean a constitutional violation occurred.

[¶19] Beylund relies on *Frost v. Railroad Comm'n of State of Cal.*, which provides that a State, when granting privileges, "may not impose conditions which require the relinquishment of constitutional rights." 271 U.S. 583, 594 (1926). The *Frost* case involved regulation of private carriers and common carriers on the highways, and the constitutional

challenge was that the legislation deprived private carriers of their property without due process of law, and denied them equal protection in violation of the Fourteenth Amendment of the federal constitution. *Id.* at 589.

[¶20] As a preliminary matter, Beylund cites no authority that clearly supports his contention that the unconstitutional conditions doctrine applies to a constitutional challenge based on the Fourth Amendment. This Court has never applied the unconstitutional conditions doctrine in the context of the Fourth Amendment. Further, we are unaware of any instance where the Supreme Court has applied the unconstitutional conditions doctrine to the Fourth Amendment. *See Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 724-25 (Minn. Ct. App. 2014). In *United States v. Knights*, the United States Supreme Court mentioned, but did not apply the unconstitutional conditions doctrine, when it concluded warrantless searches of a home, as a condition of probation, were reasonable. 534 U.S. 112, 118 (2001). Rather, the Supreme Court determined the issue by applying the general Fourth Amendment approach of examining the totality of the circumstances. *Id.* However, the absence of a decision by the Supreme Court or this Court is not conclusive.

[¶21] Beylund cites to various cases, unrelated to the unconstitutional conditions doctrine, that support the premise that the Fourth Amendment generally protects a person's right to be free of warrantless searches, under various circumstances. *See District of Columbia v. Little*, 339 U.S. 1 (1950); *Camara*, 387 U.S. 523 (1967); *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978). Additionally, Beylund cites to cases, unrelated to the Fourth Amendment, involv-

ing the unconstitutional conditions doctrine. *See Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004); *Hillcrest Prop., LLP v. Pasco Cnty.*, 939 F. Supp. 2d 1240 (M.D. Fla. 2013). Beylund contends *Dearmore v. City of Garland* applies the unconstitutional conditions doctrine to the Fourth Amendment. 400 F. Supp. 2d 894 (N.D. Tex. 2005). In this case, a Texas federal district court enjoined the enforcement of an ordinance that required an individual renting property to allow the city to inspect the property, as a condition of receiving a rental permit. *Id.* at 906. The trial court, in *Dearmore*, while not mentioning the unconstitutional conditions doctrine, imposed an injunction on Fourth Amendment principles regarding the voluntariness of consent, determining only that the ordinance was "likely to be held unconstitutional." *Id.* at 903-04. Beylund also contends *Lebron v. Sec'y of Florida Dep't of Children and Families*, 772 F.3d 1352 (11th Cir. 2014), applied the unconstitutional conditions doctrine to the Fourth Amendment. In *Lebron*, a requirement that all TANF applicants submit to suspicionless drug testing as a condition of receiving benefits was struck down. *Id.* at 1378. However, the case was not decided under the unconstitutional conditions doctrine, rather the case was decided using a "special needs" analysis generally applied to suspicionless searches. *Id.* We are not persuaded.

[¶22] Instead, we find instructive *Stevens*, 850 N.W.2d at 722-31 (refusing to apply unconstitutional conditions doctrine to a Fourth Amendment challenge of Minnesota's implied consent statutes) and *State v. Chasingbear*, No. A14-0301, 2014 WL 3802616, at *3-8 (Minn. Ct. App. Aug. 4, 2014) (holding lower court erred as a matter of law by applying unconstitutional conditions doctrine to Minnesota's

implied consent laws) (on appeal to the Minnesota Supreme Court at the time of this decision). *Stevens* and *Chasingbear* relied on *State v. Netland*, 762 N.W.2d 202 (Minn. 2009), *abrogated in part by State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), in analyzing whether the unconstitutional conditions doctrine should apply. In *Netland*, the Minnesota Supreme Court indicated the unconstitutional conditions "doctrine is properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement." *Netland*, at 211. In other words, in order to proceed with a claim of unconstitutional conditions, the defendant must show the criminal refusal statute authorizes an unconstitutional search. *Id.* at 212. While we may not agree entirely with the analysis in *Stevens* and *Chasingbear*, we agree that to prevail Beylund must show the statutes criminalizing refusal authorize an unconstitutional search.

[¶23] As the United States Supreme Court stated in *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), "[t]he touchstone of the Fourth Amendment is reasonableness." In *Birchfield*, we explained the considerations in determining reasonableness in the context of the implied consent law:

> [Reasonableness] [] is assessed by balancing the promotion of legitimate governmental interests with the intrusion on an individual's privacy. *State v. Adams*, 2010 ND 184, ¶ 15, 788 N.W.2d 619. There is no question "the State's interest in decreasing drunk driving is a valid public concern. Indeed, '[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-

> related death and mutilation on the Nation's roads are legion." *Martin v. North Dakota Dep't of Transp.*, 2009 ND 181, ¶ 7, 773 N.W.2d 190 (quoting *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990)). A licensed driver has a diminished expectation of privacy with respect to enforcement of drunk-driving laws because he or she is presumed to know the laws governing the operation of a motor vehicle, and the implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement officers to submit to a chemical test. *See, e.g., [State v.] Yong Shik Won*, 332 P.3d [661,] 681 [Haw. Ct. App. 2014]; *Stevens v. Commissioner of Pub. Safety*, 850 N.W.2d 717, 728-29 (Minn. Ct. App. 2014); [*United States v.] Muir*, 2014 WL 4258701 at *6 [(D. Ct. MD., Aug. 28, 2014)].

2015 ND 6,¶ 17.

[¶24] Beylund has not pointed out any statute under North Dakota's implied consent laws that requires him to submit to a blood test contrary to the Fourth Amendment, in other words, an unreasonable search without a warrant or an exception to the warrant requirement. Under the facts of this case, Beylund consented to the test, and consent is an exception to the warrant requirement. *City of Fargo v. Wonder*, 2002 ND 142,¶ 20, 651 N.W.2d 665 (stating "[c]onsent is a recognized exception to the warrant requirement"). Second, if Beylund had refused the test, no search would have occurred. Law enforcement is not authorized to force a test as N.D.C.C. § 39-2004(1) specifically provides if a test is refused, "none may be given."

[¶25] Assuming Beylund has a constitutional right to refuse, it does not necessarily invalidate the implied consent law under the unconstitutional conditions doctrine. *See Chasingbear*, 2014 WL 3802616, at *6 (citing *Frost*, 271 U.S. at 591). "The unconstitutional conditions doctrine looks to the purpose of the challenged condition, and it invalidates only those laws whose challenged condition bears no significant relevance to the governmental objective of the privilege that the government is conditionally conferring." *Chasingbear*, 2014 WL 3802616, at *6. The record does not reflect any analysis of the purpose of the implied consent laws. However, it is not difficult to ascertain. The Supreme Court has repeatedly recognized the States' interest in public safety in removing drunken drivers from their highways. *See Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979) (recognizing that the interest in public safety is substantially served by summary suspension of driver's license by those who refuse to be tested upon arrest). As noted in *Mackey*, the sanction for refusal serves multiple purposes: 1) to serve as a deterrent to drunken driving; 2) as a strong inducement to take the test; and 3) to promptly remove drunk drivers from the road, which contributes to public safety. *Id.* at 18.

[¶26] In *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), the Supreme Court held a highway sobriety checkpoint did not violate the Fourth Amendment, despite the fact that a seizure of the vehicle occurred without reasonable suspicion for the stop. As noted in *Sitz*, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Id.* at 451. In *Sitz*, the Court balanced the State's interests in preventing drunken driving against the intrusion upon indi-

vidual motorists, and held the field sobriety checkpoints were consistent with the Fourth Amendment. *Id.* at 455.

[¶27] In *Missouri v. McNeely*, 133 S. Ct. 1552, 1565 (2013) (plurality decision), the Supreme Court reiterated drunk driving continues to be a significant problem. In *McNeely*, the Supreme Court rejected the notion that the natural dissipation of alcohol in the bloodstream established a per se exigency that would justify an exception to the warrant requirement. *Id.* at 1563. However, the Court noted:

> States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. . .. *Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution. . . . *see also South Dakota v. Neville*, 459 U.S. 553, 554, 563-564, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination).

Id. at 1566. It is clear that the State has a compelling state interest in regulating intoxicated drivers.

The next step of the analysis is to determine whether the State's interest in regulating intoxicated drivers is related to the privilege of driving in such a way that the implied consent statutes are reasonable.

[¶28] North Dakota's implied consent laws, like Minnesota's, "confers on drivers the privilege of *soberly* operating inherently dangerous motorized vehicles on the state's roadways . . . and, in exchange, each driver accepts a statutory choice," *Chasingbear*, 2014 WL 3802616, at *7. The choice is to consent to testing or face civil and criminal penalties equivalent or possibly less than those if convicted of driving under the influence. *See Birchfield*, 2015 ND 6, ¶ 17 (noting that driver may avoid enhanced penalties for being highly intoxicated by refusing chemical testing).

[¶29] As noted in *Birchfield*, a licensed driver has a diminished expectation of privacy with respect to the enforcement of drunk-driving laws, and our implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement to submit to a chemical test. *Id.* at ¶ 17.

[¶30] As we have explained in cases challenging the constitutionality of a statute:

> An Act of the legislature is presumed to be correct and valid, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity. A statute enjoys a conclusive presumption of constitutionality unless it is clearly shown that it contravenes the state or federal constitution. The justice, wisdom, necessity, utility and expediency of legislation are questions for the

> legislative, and not for judicial determination.

McCoy, 2014 ND 119, ¶ 27, 848 N.W.2d 659. As a result, the burden for overturning a statute is high, and we are not convinced the implied consent law is invalid under the unconstitutional conditions doctrine. Accordingly, Beylund's unconstitutional conditions argument fails, and we affirm the district court.

VI

[¶31] We conclude Beylund voluntarily consented to the chemical blood test. We further conclude North Dakota's implied consent law as challenged, either on its face or as applied, does not violate the Fourth Amendment of the United States Constitution applying either general Fourth Amendment principles or under the doctrine of unconstitutional conditions. Finally, we decline to address the arguments Beylund failed to include in his notice of appeal and specifications of error. The judgment is affirmed.

[¶32]

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

Supreme Court No. 20140133
Bowman County Case No. 2013-CV-00095

Appeal from the district court of Bowman County.

Steve Michael Beylund, Petitioner and Appellant

v.

Grant Levi, Director of the Department of Transportation, Respondent and Appellee

[¶1] This appeal having been heard by the Court at the September 2014 Term before:

[¶2] Chief Justice Gerald W. VandeWalle, Justice Dale V. Sandstrom, Justice Carol Ronning Kapsner, Justice Daniel J. Crothers, and Justice Lisa Fair McEvers;

[¶3] and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of the district court is AFFIRMED.

[¶4] IT IS FURTHER ORDERED AND ADJUDGED that Grant Levi, Director of the Department of Transportation have and recover from Steve Michael Beylund costs and disbursements on this appeal under Rule 39, N.D.R.App.P., to be taxed and allowed in the court below.

[¶5] This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the

Supreme Court on the date it is issued to the district court under N.D.R.App.P. 40.

Dated: February 12, 2015

By the Court:

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BOWMAN	SOUTHWEST JUDICIAL DISTRICT

Steve Michael Beylund, Petitioner, vs. North Dakota Department of Transportation, Respondent.	MEMORANDUM OPINION AND ORDER Case No. 06-2013-CV-95

[1] This matter is an appeal, pursuant to N.D.C.C. §39-20-06, of the hearing officer's decision, on September 18, 2013, to suspend Steve Michael Beylund's driving privileges for a period of two years. This Court has reviewed the transcript of testimony including attached exhibits and has considered the briefs and the entire record on appeal4nthis matter. The decision of the Court is to AFFIRM the hearing officer's decision.

[2] An appeal from an administrative hearing officer's decision involving a license suspension under §39-20-04.1 is governed by the Administrative Agencies Practice Act and is civil in nature. See *Hammeren v. North Dakota State Highway Com'r*, 315 N.W.2d 679, 681 (N.D. 1982). The Court's role in reviewing the hearing officer's decision is limited to the consideration of the following questions:

1. Whether the order is in accordance with the law.
2. Whether the order violates the constitutional rights of the appellant.
3. Whether the provisions of chapter 28-32 have been complied with in the proceedings before the agency.
4. Whether the rules of procedure of the agency afforded the plaintiff a fair hearing.
5. Whether the findings of fact made by the agency are supported by a preponderance of the evidence.
6. Whether the conclusions of law and order of the agency are supported by its findings of fact.
7. Whether the findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. Whether the conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge. N.D.C.C. §28-32-46 (N.D. 2005).

N.D.C.C. § 28-32-46.

[3] In the process of reviewing the factual findings of an administrative agency "we do not make independent findings of fact or substitute our judgment for that of the agency. We determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record."

Bryl v. Backes, 477 N.W.2d 809, 811 (N.D.1991) (quoting *Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220 (N.D.1979)). "This standard defers to the hearing officer's opportunity to hear the witnesses' testimony and to judge their credibility and we will not disturb the agency's findings unless they are against the greater weight of the evidence." *Johnson v. N.D. Department of Transportation*, 530 N.W.2d 359, 361 (N.D.1995).

[4] It is the Court's assessment from the entire record on appeal that there are two issues: (1) whether Beylund was illegally stopped; and (2) whether Beylund's consent to the chemical tests was coerced.

[5] Petitioner's first argument is that he was illegally stopped by Officer Brien. The Fourth Amendment of the United States Constitution, which is made applicable to the states by the Fourteenth Amendment, and Article I, Section 8 of the North Dakota Constitution, protects against unlawful searches and seizures. *City of Mandan v. Gerhardt*, 2010 ND 112, ¶8, 783 N.W.2d 818. In *Gerhardt*, supra, the court stated that all searches and seizures must be reasonable and the Court provided the permissible types of law enforcement-citizen encounters it has identified:

> (1) arrests, which must be supported by probable cause; (2) *Terry* stops, see *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), seizures which must be supported by a reasonable and articulable suspicion of criminal activity; and (3) community caretaking encounters, which do not constitute Fourth Amendment seizures. *Olson*, 2007 ND 40, ¶ 9, 729 N.W.2d 132; *Torkelsen*, 2006 ND 152, ¶ 10, 718 N.W.2d 22. This Court has also recognized that "it is not a seizure for an

> officer to walk up to and talk to a person in a public place." *Jerome*, 2002 ND 34, ¶ 5, 639 N.W.2d 478 (citing *State v. Steinmetz*, 552 N.W.2d 358, 359 (N.D.1996)). "Within the context of the Fourth Amendment, a seizure occurs 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " *Olson*, at ¶ 9 (quoting Jerome, at ¶ 5).

City of Mandan v. Gerhardt, 2010 ND 112, ¶8, 783 N.W.2d 818. The *Gerhardt* case provides several defining characteristics of what constitutes a community caretaking encounter. *Gerhardt*, 2010 ND 112, ¶¶9-11, 783 N.W.2d at 821-23. The community caretaking function is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* quoting *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed. 706 (1973). A community caretaker encounter allows law enforcement-citizen contact, including stops, where an officer has no reasonable suspicion of criminal activity. *Gerhardt*, 2010 ND 112, ¶10, 783 N.W.2d at 822. However, there can be no community caretaking role for an officer where it is obvious that a citizen neither wants nor needs assistance. *Gerhardt*, 2010 ND 112, ¶11, 783 N.W.2d at 822.

[6] The *Gerhardt* Court also pointed out that "[t]he law distinguishes between law enforcement stopping a moving vehicle and approaching a vehicle that is already stopped." *Gerhardt*, 2010 ND 112, ¶10, 783 N.W.2d at 822, See also *State v. Franklin*, 524 N.W.2d 603, 604 (ND 1994) ("...it is not a seizure for an officer to walk up to and talk to a person in a public place, including a person in a parked car.") The

Gerhardt Court noted that "[e]ven a casual encounter, however, can evolve into a seizure when a reasonable person would view a law enforcement 'officer's actions–if done by another private citizen as threatening or offensive.'" *Id.* quoting *State v. Boyd*, 2002 ND 203, ¶7, 654 N.W.2d 392.

[7] Here Officer Brien testified at the administrative hearing that there had been a report of a suspicious vehicle in someone's yard north of Bowman and he was patrolling the Highway 85/Frontage Road for this vehicle. Tr. p. 6, 11. 22-25; p. 7, 11. 5-8. Officer Brien testified that he observed a light colored vehicle driven by an older male subject drive by where he was parked on the corner of Highway 85 and Frontage Road. Tr. P. 7, 11. 11-15. Officer Brien said "I didn't think anything of that at the time." Tr. p. 7, 11. 16-17. Officer Brien noticed the light-colored vehicle drive partially off the road, missing the driveway that goes to Sleepy Hollow Body Shop, almost strike a stop sign, and stop still parked partially on the highway. Tr. p. 7, 11. 18-22. Officer Brien testified he pulled up behind the light colored vehicle, which was later identified as Beylund's vehicle, without activating his emergency lights, and then walked up to Beylund's vehicle "...to make sure everything was fine with the individual or what was going on." Tr. p. 8, 11. 2-5.

[8] Officer Brien's actions are consistent with an officer conducting a community caretaking encounter. Officer Brien approached Beylund, who was already stopped, and inquired as to the parking arrangement of Beylund's vehicle in light of the potential hazard it created. It does not appear obvious in this situation that Beylund neither wanted nor needed assistance. A reasonable person probably would not have viewed

Officer Brien's actions as threatening or offensive. A vehicle parked in such a manner could just as easily have been a stranded motorist who either did not recognize the hazard of parking in such a way, or whose vehicle stalled and could not be moved to a place that was not hazardous. As such, this Court finds that Officer Brien's actions in regards to approaching Beylund was a valid community caretaker encounter and thus lawful.

[9] Petitioner's second and final argument is that he was coerced into consenting to the chemical tests because refusal of the tests is a crime in North Dakota and also appears to be arguing in general that the North Dakota Implied Consent law is a violation of his Fourth Amendment rights. Beylund asserts that in light of the United States Supreme Court decision in *Missouri v. McNeely*, a warrant is required for a search of the blood, breath, or urine; that the unconstitutional conditions doctrine as articulated in *Frost v. RR Comm'n* applies to his case such that he should not have to subject himself to the possibility of a chemical test in order to obtain a driver's license; and Beylund also asserts that holdings in the U.S. Supreme Court cases of *Schneckloth v. Bustamonte* and *Bumper v. North Carolina* suggest that his consent to the chemical tests was coerced.

[10] Petitioner's reliance on the *Missouri v. McNeely* decision is not persuasive. In *Missouri v. McNeely*, the United States Supreme Court considered the following issue: "Whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations." *Missouri v. McNeely*, 133 S.Ct. 1552, 1557 (2013). The Court

held that the natural dissipation of alcohol in the blood may support a finding of exigency in specific cases, but it does not do so categorically. *McNeely*, 133 S.Ct at 1563. As such, the reasonableness of a warrantless blood test of a drunk driving suspect is determined on a case by case basis based on the totality of the circumstances. *Id.* In *McNeely* the drunk driving suspect refused the blood test after being read Missouri's Implied, Consent Advisory. *McNeely*, 133 S.Ct. at 1557. The officer took the suspect to a nearby hospital, without attempting to obtain a warrant, and had the suspect's blood drawn without the suspect's consent. *Id.*

[11] Here, Beylund consented to the breath and blood tests. McNeely concerns a nonconsensual intoxication test that was administered by law enforcement despite the DUI suspect's refusal. Because Beylund consented to the test, and, as such, the test was obtained in accordance with North Dakota law, the exceptions to the warrant requirement, including the existence or nonexistence of exigent circumstances, are not relevant here.

[12] Additionally, the Court would point out that the United States Supreme Court recognized the continued viability of implied consent laws in *McNeely*, supra at p. 1556, as a recognized exception to the warrant required in the absence of exigent circumstances. Thus, Beylund's argument in reliance on *McNeely* that the breath and blood tests he consented to were a violation of his Fourth Amendment rights is not persuasive.

[13] The Court does not find Beylund's argument regarding *Frost v. RR Comm'n* to be persuasive either. In *Frost v. RR Comm'n*, the Railroad Commission agreed that the plaintiffs in error were private carri-

ers but asserted they were nevertheless required as transportation companies to obtain a permit and a certificate declaring that public convenience and necessity require the exercise of such right or privilege to operate for compensation on public highways. *Frost v. RR Comm'n*, 271 U.S. 583, 590, 46 S.Ct. 605, 606 (1926). The Supreme Court stated the issue in the case as follows:

> In other words, the case presented is not that of a private carrier, who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier, but it is that of a private carrier, who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the Railroad Commission.

Frost, 271 U.S. at 592, 46 S.Ct. at 606-07. The Court continues:

> Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given to Choice, except a choice between the rock and the whirlpool–an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

Frost, 271 U.S. at 593, 46 S.Ct. at 607. The Court reasoned that a state may place condition upon privileges it has the power to altogether deny; however,

that power has limits, and the state may not put in place such conditions which would require the relinquishment of constitutionally protected rights. *Frost*, 271 U.S. at 593-94, 46 S.Ct. at 607.

[14] The *Frost* case describes the limitation on states to impose conditions on constitutionally protected rights. For example, in *Frost*, at issue was the Plaintiff's right to perform its transportation contract using the public highways of California without having to become designated as a "common carrier," including all the burdens placed upon having that designation. Here, Beylund asserts that because he has to agree to the possibility that his blood, breath, or urine could be tested in order to have the privilege of a driver's license in North Dakota, he has been subjected to an unconstitutional condition. The Court is not persuaded that the Implied Consent law of North Dakota places an unconstitutional condition on those who obtain driver's licenses. The law does not require one to give up his Fourth Amendment rights. One is always free to refuse the chemical tests. Thus, Beylund's reliance on *Frost* is not persuasive.

[15] Beylund has asserted that his consent to the breath and blood tests was coerced because refusing the test is a crime in North Dakota. Beylund cites US Supreme Court holdings in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) and *Bumper v. North Carolina*, 391 U.S. 543 (1968) to support his argument that his consent to the chemical tests was coerced. The Court does not find this argument persuasive.

[16] The Court would point out the recently decided Minnesota Supreme Court case *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013). Absent precedent in North Dakota regarding this matter, this Court finds this

Minnesota case based on similar facts and law to be persuasive.

[17] The issue in *State v. Brooks* was whether Brooks' Fourth Amendment rights were violated when police took blood and urine samples from him without first obtaining a search warrant during three separate drunk-driving investigations. *State v. Brooks*, 838 N.W.2d 563, 565 (Minn. 2013). The district court convicted Brooks in all three cases of drunk driving and Brooks appealed each of them. *Brooks*, 838 N.W.2d at 566-67. The Minnesota Court of appeals upheld the convictions, relying on Minnesota precedent which held that the evanescence of alcohol in the body created exigent circumstances allowing police to search drivers suspected of drunk driving without a warrant. *Brooks*, 838 N.W.2d at 567.

[18] On appeal to the Minnesota Supreme Court, Brooks argued that, in light of *McNeely*, the warrantless search of his blood and/or urine could not be upheld based on the exigency caused by the dissipation of alcohol in the body. *Id.* The Court agreed, but upheld Brooks' convictions on other grounds. The Minnesota Supreme Court held that "[b]ecause we conclude that Brooks consented to the searches at issue, and thus that a warrant was unnecessary, we affirm." The Minnesota Supreme Court summed up its opinion as follows:

> As a threshold matter, Brooks's argument is inconsistent with the Supreme Court's discussion of implied consent laws in *McNeely*. As the Supreme Court recognized in *McNeely*, implied consent laws, which "require motorists, as a condition of operating a motor vehicle within the State, to consent to

> [blood alcohol concentration] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense," are "*legal tools*" states continue to have to enforce their drunk driving laws. ---U.S. at ---, 133 S.Ct. at 1566 (plurality opinion) (emphasis added). The Court noted that these laws typically require suspected drunk drivers to take a test for the presence of alcohol and mandate that a driver's license will be revoked if they refuse a test. *Id.* By using this "legal tool" and revoking a driver's license for refusing a test, a state is doing the exact thing Brooks claims it cannot do-conditioning the privilege of driving on agreeing to a warrantless search.
>
> Even more importantly, however, we do not hold that Brooks consented because Minnesota law provides that anybody who drives in Minnesota "consents...to a chemical test." See Minn.Stat. §169A.51, subd. 1(a). Rather, we hold that Brooks consented based on our analysis of the totality of the circumstances of this case. For that reason, *State v. Henning*, 666 N.W.2d 379 (Minn. 2003), on which Brooks relies, is inapposite.

Brooks, 838 N.W.2d at 572-573.

[19] Brooks argued that he did not actually consent to the tests; instead, he only agreed to the tests because refusal is a crime and that any consent based on an implied consent statute is unconstitutional. The Minnesota Supreme Court disagreed. It said, "[b]ased on the analysis in *Neville* and *McDonnell*, a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Brooks*, 838

N.W.2d at 570. See also *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991) and *South Dakota v. Neville*, 459 U.S. 553, 564, 103 S.Ct. 916 (1983) (these cases deal with Fifth Amendment rights in regards to such Implied Consent laws and the *Brooks* court extended that reasoning to address Brooks' Fourth Amendment issues). The Court stated:

> Although refusing the test comes with criminal penalties in Minnesota, the Supreme Court has made clear that while the choice to submit or refuse to take a chemical test "will not be an easy or pleasant one for a suspect to make," the criminal process "often requires suspects and defendants to make difficult choices." *Neville*, 459 U.S. at 564, 103 S.Ct. 916.

Brooks, 838 N.W.2d at 571.

[20] In *Brooks* there was no dispute as to whether the police properly followed statutory requirements for the arrest nor whether, as a factual issue, he agreed to the tests. *Brooks*, 838 N.W.2d at 569. The Minnesota Supreme Court ultimately applied the "totality of the circumstances" test to determine whether Brooks' consent was indeed voluntary. *Brooks*, 838 N.W.2d at 568-69, 572.

[21] "The Court's analysis suggests it was unwilling to find that the refusal statute, as a stand-alone factor, rendered consent to a chemical test coerced. The Court instead held that consent obtained by reading a drunk-driving suspect the Implied Consent Advisory (including the "refusal is a crime" portion) is subject to the "totality of the circumstances" test just

like other instances where consent is alleged to have been coerced.

[22] In *Brooks*, the Court analyzed the following factors in its "totality of the circumstances" test: (1) the fact that Brooks was under arrest was not dispositive because he was not subjected to repeated questioning from law enforcement or asked to consent to the test after spending days in police custody; (2) Brooks consulted with counsel each time before agreeing to take each test such that his attorney could serve as an advisor to explain the alternative choices; and (3) law enforcement made it clear to Brooks that he had a choice whether to take the test or refuse it.

[23] Absent North Dakota authority on this issue, the Court finds the *Brooks* opinion persuasive. The Court finds there is no bright line rule in a case such as this. The reading of an implied consent/refusal statute in and of itself does not indicate automatic coercion regarding consent to a chemical test. Seeing no reason the coerced consent issue should be analyzed differently, this court turns to current North Dakota precedent regarding consent and coercion, which indicates that the "totality of the circumstances" approach is the appropriate method with which to assess whether consent was coerced. See *State v. Morrin*, 2012 ND 75, ¶7, 815 N.W.2d 229, which provides:

> Consent is a recognized exception to the warrant requirement. *Id.* at ¶ 9. The district court must determine if the consent was voluntary under the totality of the circumstances. *State v. Avila*, 1997 ND 142, ¶ 16, 566 N.W.2d 410. To be voluntary, the consent must not be coerced by explicit or implicit methods or through implied threats or covert

> force. Id. The existence or absence of certain factors concerning the condition and characteristics of the individual at the time of consent and the details of the setting in which consent was obtained are significant in determining voluntariness, but no one factor is dispositive. *Id.* "[T]o sustain a finding of consent, the State must show affirmative conduct by the person alleged to have consented that is consistent with the giving of consent, rather than merely showing that the person took no affirmative actions to stop the police from entering." *Id.* at ¶17.

[24] There were other factors involved in *Brooks*, such as Brooks discussing the matter with his attorney, unlike in Beylund's case, that weighed in favor of finding consent. Although this appears to be true, the holding in *Brooks* indicates the reading of an implied consent/refusal advisory is only one factor in the totality of the circumstances test for coercion as a whole, and that it does not serve as a stand-alone factor automatically making consent coerced.

[25] Beylund has failed to allege any other factors that might suggest his consent was coerced, aside from the reading of the Implied Consent/Refusal law itself. Beylund failed to assert that any implied threats or covert force was used in obtaining his consent. Assessing the totality of the circumstances, this Court is not persuaded that Beylund was coerced into consenting to the chemical tests of his breath and blood.

[26] Therefore, for the reasons discussed above, it is the ORDER of this Court that the decision of the hearing officer is hereby AFFIRMED.

Dated this 3 day of Feb, 2014.

BY THE COURT:

William Herauf
District Judge

CERTIFICATE OF SERVICE

The undersigned, Deborah Sheets, does hereby certify that on February __ 2014, she caused copies of the above document to be emailed to the following:

Thomas Murtha
Douglas B. Anderson

Deborah, Sheets

APPENDIX C

STATE OF NORTH DAKOTA	**IN DISTRICT COURT**
COUNTY OF BOWMAN	**SOUTHWEST JUDICIAL DISTRICT**
Steve Michael Beylund, Appellant/Petitioner; vs. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	**JUDGMENT** **Civil No. 06-2013-CV-00095**

[¶1] The Court, having ordered judgment entered in this action,

[¶2] IT IS HEREBY ORDERED AND ADJUDGED that the decision of the administrative hearing officer suspending appellant's driving privileges for two years is affirmed.

[¶3] IT IS FURTHER ORDERED AND ADJUDGED that neither attorneys' fees nor costs are awarded to either party.

[¶4] WITNESS, the Honorable William Herauf, District Judge, and my hand and the seal of the Court this 10th day of February, 2014.

/s/

Jan Werre
Clerk of District Court

APPENDIX D

HEARING OFFICER'S DECISION

North Dakota Department of Transportation, Legal Division
SFN 9342 (REV 8-06)

Name of Petitioner	When hearing held	Operator's License Number
BEYLUND, STEVE MICHAEL	9/18/2013	BEY-49-7341
Address of Petitioner	**Attorney**	**County of Occurrence**
1208 3RD AVE NE, BOWMAN, ND 58623	THOMAS F. MURTHA	BOWMAN

Date of Birth	Date of Occurrence	Date of Temporary Operator's Permit	Issuing Agency
4/7/1949	8/10/2013	8/19/2013	BOWMAN POLICE DEPT

FINDINGS OF FACT

Officer Brien was dispatched to a call of an unwanted person. While in route, the vehicle left the property. Officer Brien observed a vehicle that matched the description given and pulled in behind the vehicle. At about 9:00PM, the vehicle made a right hand turn into a driveway, narrowly missing a stop sign and then stopping with his vehicle still partially in the roadway. Officer Brien stopped behind him and approached the vehicle. Upon approaching the vehicle, Officer Brien noticed an empty wine glass in the middle console, and an odor of alcohol coming from the vehicle. The driver, later identified as Mr. Beylund said he had missed his turn. Officer Brien had Mr. Beylund move his vehicle off the road and then asked him to exit the vehicle. Mr. Beylund did not want to exit his vehicle and waited until Officer Brien opened his door and commanded him to exit before exiting. While exiting the vehicle, Mr. Beylund stumbled and grabbed the door for support.

Mr. Beylund moved to the back of his vehicle. Mr. Beylund displayed poor balance. Mr. Beylund did not follow instructions, and had injuries so all field sobriety tests were refused. Mr. Beylund said that he would take an onsite screening test but failed to provide an adequate breath sample despite several attempts. Officer Brien told Mr. Beylund he was under arrest for driving while under the influence of alcohol. Mr. Beylund was arrested at 9:51PM. Mr. Beylund was very uncooperative and refused to get into the patrol vehicle. Once he had been placed in the patrol vehicle, Mr. Beylund was transported to the hospital. At the hospital Officer Brien read the implied consent advisory. Mr. Beylund agreed to take a chemical blood test. A blood sample was collected by an authorized person at 9:44PM. The sample was submitted to the state lab, according to the approved procedure. At the state lab, the blood sample was analyzed by a qualified analyst, on an approved device, according to the approved method. The test was fairly administered. The test results obtained showed an alcohol concentration of 0.250 g/100mL. The report and notice was issued.

CONCLUSIONS OF LAW

Officer Brien had reasonable grounds to believe Mr. Beylund had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of NDCC section 39-08-01 or equivalent ordinance. Mr. Beylund was placed under arrest and tested in accordance with NDCC section 39-20-01 and section 39-20-02. The test results show Mr. Beylund had an alcohol concentration of at least eighteen one-hundredths of one percent by weight.

DECISION: Suspend for 2 Years

NOTICE: If this decision is to suspend or revoke, it constitutes the official notice of the action against your driving privileges by the NDDOT Director of this date.

Date: 9/18/2013

/s/

SARAH A. HUBER, Hearing Officer
NDDOT, 608 E. BLVD AVE,
BISMARCK, ND 58505
(701) 328-4320

TEMPORARY PERMIT: This document is not valid as a temporary permit

Reason: Decision Mailed.

Date: 9/18/2013

/s/

Signature of Hearing Officer

The undersigned certifies that on 9/18/2013 a true and correct copy of this document was sent by mail, United States postage prepaid, or was sent by email, to the following persons:

OFFICER SHAWN BRIEN #1821, BOWMAN POLICE DEPT., P.O. BOX 12, BOWMAN, ND 58623

STEVE MICHAEL BEYLUND, 1208 3RD AVE NE, BOWMAN, ND 58623

THOMAS F. MURTHA, ATTORNEY AT LAW, P.O. BOX 1111, DICKINSON, ND 58602

/s/

Signature of Hearing Officer

APPENDIX E

SUPREME COURT OF NORTH DAKOTA
OFFICE OF THE CLERK
600 E Boulevard Avenue
Bismarck, ND 58505-0530
(701) 328-2221 (voice) (701) 328-4480 (fax)
1-800-366-6888 (TTY)
supclerkofcourt@ndcourts.gov

VIA E-MAIL ONLY

March 24, 2015

Thomas F. Murtha IV
135 Sims, Suite 217
P.O. Box 1111
Dickinson, ND 58602-1111

RE: Reylund v. Levi
Supreme Court No. 20140133
Bowman Co. No. 2013-CV-00095

The Supreme Court entered an order today denying the petition for rehearing in this matter.

Pursuant to Rule 41(a), N.D.R.App.P., the mandate of the Supreme Court will be forwarded to the clerk of the trial court after the expiration of seven days.

Sincerely yours,
/s/
Penny Miller
Clerk
North Dakota Supreme Court

pc: Douglas Bruce Anderson
The Honorable William Herauf